spirit of good faith, which the members of the bar were justified in expecting of the respondent when they admitted him to practice.

THE ADMISSIBILITY IN EVIDENCE OF PRIVILEGED COMMUNICATIONS BETWEEN HUSBAND AND WIFE.

The defendant in *People v. Dunnigan,* 128 N. E., 180 (Mich.), was convicted of murder. The record discloses the fact that while defendant was in custody charged with some petty offense, one W. was admitted to his cell and in the course of a conversation, sugested that if the defendant wished to communicate with his wife that he, W., would deliver the message. Thereupon the defendant addressed a letter to his wife in which he used language that was construed as a confession of guilt in committing the homicide. W., instead of delivering the letter to the defendant's wife, surrendered it to the sheriff, who used it in evidence against the defendant. It was held that such a self-incriminating letter written by accused and sent to his wife, but not received by her, being intercepted by the sheriff, is not privileged within the statute which prohibits examination of spouses respecting communications between them.

Mr. Wigmore, in his treatise on Evidence, says, that the history of the privilege of communication between husband and wife is involved in a tantalizing obscurity. It was understood to exist in some shape before the end of the sixteenth century, and was firmly established by the latter part of the seventeenth century. So this principle, hitherto existing rather in principle than in rule, practically begins its existence and is defined in terms by the legislation of that period. *Wigmore on Evidence,* Sec. 2333. The earliest reported case in point is *Lady Ivy's Case,* 10 How. St. R., 555 (1684), which held that a husband will not be permitted to testify to communications from his wife.

It is difficult to distinguish the development of the privileged communication rule as to husband and wife, from that of the rule of the disqualification of either spouse as a witness. The earliest mention of the latter rule is found in an *Anonymous Case,* 1 B. & G., 47 (1651), which held that a wife would not be permitted to testify against her husband. The court said in

King v. Cliviger, 2. D. & E., 263 (1788), that a wife shall not be called to give evidence even tending to criminate her husband. She cannot be a witness either for or against him. She cannot testify for him because their interests are identical, and she cannot testify against him because it is against the policy of the law. The same was held in *O'Connor v. Marjoribanks,* 4 M. & G., 435 (1842), and it is now a firmly established rule both in England and in the United States. Most states have statutes prohibiting the examination of either spouse in regard to communications between them during the existence of the marital relation.

The courts universally hold that the preservation of the sacredness and confidence of the matrimonial relation, being a matter of public policy, the disclosure by either spouse of the confidential communications between them, should be prohibited. There is some conflict upon the application of that rule when such communication is in the form of a letter and that letter is in the hands of a third person.

There are two distinct lines of decisions; one holding that the communication is in itself inherently privileged and that the privilege can be waived only by the writer. *Mercer v. State,* 40 Fla., 216; *Scott v. Commonwealth,* 94 Ky., 511; *Wilkerson v. State,* 91 Ga., 729; *Maynard v. Vinton,* 59 Mich., 152; *Mitchell v. Mitchell,* 80 Tex., 101; *Selden v. State,* 74 Wis., 271.

Mercer v. State, supra, holds that the communication is privileged regardless of how the third party came into its possession. The court in *Scott v. Com., supra,* said that a letter from a husband to his wife cannot under any circumstances be used in evidence. In the language of *Maynard v. Vinton, supra,* the privilege is the privilege of the person making the communication and can be waived only by him personally. This rule rests upon public policy and the seal which the law has fixed upon communications between husband and wife during the existence of the marital relation. It remains forever, unless removed by both parties. The rule is followed by *Derham v. Derham,* 125 Mich., 109.

On the other hand, what seems to be the weight of authority is found in the cases which follow 1 *Greenleaf Evid.,* Sec. 254 (a), which is as follows: Though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained,

this is no valid objection to their admissibility if they are pertinent to the issue. This court will not take notice of how they were obtained, whether lawfully or unlawfully, nor will it form an issue to determine the question.

In *State v. Buffington,* 20 Kan., 599, the defendant's wife had voluntarily surrendered the letter from the defendant to the prosecuting witness and the court said that as the letter is now in the custody and control of a third person, it is admissible in evidence. The same was held in *State v. Hoyt,* 47 Conn., 518; *State v. Hayes,* 140 N. Y., 484; *State v. Ulrich,* 110 Mo., 350. The tendency of the privilege is to prevent the full disclosure of the truth and it is therefore to be strictly construed. *Lloyd v. Pennie,* 50 Fed., 4.

The judge refused to admit the letters in evidence because of the peculiar facts in the particular case in *Bowman v. Patrich,* 32 Fed., 368.

There is no question but that the defendant in the present case intended the letter as a confidential communication to his wife and that this evidence was obtained by a culpable breach of the confidence reposed in W., and also in the collusion of the sheriff. Therefore, as this method of obtaining a conviction is most reprehensible and is plainly calculated to discourage and even destroy the sacred confidences of the matrimonial state, it seems that the interests of public policy demand that the court take cognizance of the facts that were before it and, following *Bowman v. Patrich, supra,* exclude the evidence.

INFANT'S RIGHT TO DAMAGES FOR INJURIES CAUSED BY ELECTRIFIED THIRD RAIL.

As a power conductor, the electric third rail is in many cases the most practicable, and under certain conditions, the only possible method of operating trains open to modern transportation lines. These rails invariably carry a powerful current, usually alternating, and because complete insulation would render them entirely useless, they constitute in their position on the ground and similarity to common road rails a menace to life, calling for peculiar precautions and safeguards, not demanded from owners of ordinary property.